Supreme Court, U.S.
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91-2073

No. 91-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHNNIE WALKER,

Petitioner,

v

FRITO-LAY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Should this case be remanded for consideration in light of the enactment of the 1991 Civil Rights Act, which confirms petitioner's right to a jury, with such proper judicial instruction and relief as may be necessary for appropriate consideration, by an impartial factfinder, of claims arising under 42 U.S.C. § 1981, and Title VII of the Civil Rights Act of 1964?

(2) Have trial courts and courts of appeal, including those in the Eleventh Circuit, misapplied Patterson v. McLean Credit Union to bar claims of racially discriminatory discharges, and thus overruled settled law on their own authority and injured victims of such terminations whose claims arose before Patterson was decided, and which were still pending when the Civil Rights Act of 1991 was enacted into law?

(3) Was Petitioner denied due process and the appearance of justice, by summary affirmance on appeal, of decisions made by a trial judge, who refused to recuse herself without stated reason or to step aside for impartial assessment of a motion and affidavit made for judicial disqualification at the outset, and by a Rule 60 (b) motion for reconsideration of recusal, after trial?

PARTIES

All parties in this matter are set forth in the caption.[1]

1--Respondent Frito-Lay, Inc. is affiliated with the following: A&M Food Services, Inc., Ainwick Corporation Amarillo Pepsi-Cola, Inc., Anderson Hill Insurance Limited, Atlantic Soft Drink Co., Inc., Atlantic Soft Drink Company of Knoxville, Calny, Inc., Belfast Bottling Co. of Reno, Beverage Products Corporation, Beverages, Foods & Services Industries, Inc., Brainerd-Wadena Beverage Co., Contract Beverages, Inc., Contract Recyclers, Inc., Crispflow Limited, Davlyn Realty Corporation, Dr. Pepper Bottling Co. of San Francisco, East Kentucky Beverage Co., Inc., Edmund Industrial Redevelopment Corporation, Elko Bottling Co., El KrAm, Inc., Embotelladora de Uruguay, S.A., Empresas Gamesa, S.A. de C.V., Equity Beverage, Inc., Erie Bottling Corporation, Florida International Fruchtsaftgetraenke GmbH FL Holdings, Inc., Frito-Lay, Inc., Frito-Lay Finance N.V., Frito-Lay of Puerto Rico, Inc.,

Frito-Lay of the Islands, Inc.; Frito-Lay, Texas, Inc.; Frito-Texas, Inc.; General Beverage of Oklahoma, Inc.; General Cinema Beverages, Inc.; General Cinema Beverages of Akron, Inc.; General Cinema Beverages of California, Inc.; General Cinema Beverages of Dayton, Inc.; General Cinema Beverages of Ft. Myers, Inc.; General Cinema Beverages of Georgia, Inc.; General Cinema Beverages of Indiana, Inc.; General Cinema Beverages of Miami, Inc.; General Cinema Beverages of North Carolina, Inc.; General Cinema Beverages of North Florida, Inc.; General Cinema Beverages of Ohio, Inc.; General Cinema Beverages of Springfield, Inc.; General Cinema Beverages of Virginia, Inc. General Cinema Beverages of Washington, D.C., Inc.; General Cinema Beverages of West Virginia, Inc.; General Cinema Beverages of Youngstown, Inc.; Hostess--FL NRO Ltd.; Iron Range Bottling Co., Inc.; IVI Panagopoulas, Inc.; Jackson Davis Bottling Co.; Kentucky

Fried Chicken Corporation; Kentucky Fried Chicken Corporation Holdings, Ltd.; Kentucky Fried Chicken International Holdings, Inc., KFC Corporation; KFC National Management Company; Laurel Group Limited; MBA Brainerd Co.; MBA Dodge City Co.; MBA Elko Co.; MBA Grant Island Co.; MBA Jackson Co., MBA Lyons Co.; MBA Mesa Co.; MBA Omaha Co.; MBA Recyclers Co.; MBA Salt Lake Co.; MBA St. Louis Co.; MBA St. Paul Co.; MBA Tulsa Beverage Co.; MBA Waterloo Co.; MBA Wichita Co.; Mesa Beverage Company; National Beverages, Inc.; New Century Beverage Company; Paige Corporation N.V.; Paine Corporation N.V.; PARCO N.V.; PEI N.V.; Penn Alto Bottling Works, Inc.; Pepsi-Capital Corporation N.V.; PepsiCo., Inc.; PepsiCo Australia Pty, Limited; PepsiCo Enterprises, Inc.; PepsiCo. Finance (Antilles A) N.V.; PepsiCo. Finance (Antilles B) N.V.; PepsiCo. Finance (U.K.) Ltd.; PepsiCo. Holdings Ltd.; PepsiCo. (Ireland) Ltd.' PepsiCo. Overseas Corp.; PepsiCo. Overseas Finance N.V.; PepsiCo World Trading Company, Inc.; PepsiCo World Trading Company (UK) Ltd.; Pepsi-Cola Alton Bottling, Inc.; Pepsi-Cola Argentina, S.A.C.I.; Pepsi-Cola (Bermuda) Limited; Pepsi-Cola Bottling Company of Clarksburg; Pepsi-Cola Bottling Co. of Crisp, Inc.

Pepsi-Cola Bottling Company of Cumberland, Inc.; Pepsi-Cola Bottling Company of Danville; Pepsi-Cola Bottling Company of Dodge City, Inc.; Pepsi-Cola Bottling Company of Grand Island Pepsi-Cola Bottling Company of Johnstown, Pa.; Pepsi-Cola Bottling Co. of Omaha, Inc.; Pepsi-Cola Bottling Co. of Perry, Inc.; Pepsi-Cola Bottling Co. of Los Angeles; Pepsi-Cola Bottling Co. of Lyons, Inc.; Pepsi-Cola Bottling Company of Minneapolis & St. Paul; Pepsi-Cola Bottling Co. of Oklahoma City, Inc.; Pepsi-Cola Bottling Company of Petersburg, Inc., Virginia; Pepsi-Cola Bottling Company of Petersburg, Inc., West Virginia; Pepsi-Cola Bottling Co. of Reading; Pepsi-Cola Bottling Co. of Salinas, Inc.; Pepsi-Cola Bottling Co. of Salt Lake City, Inc.; Pepsi-Cola Bottling Co. of Santa Cruz, Inc.; Pepsi-Cola Bottling Co. of South Jersey, Inc.; Pepsi-Cola Bottling Company of St. Louis, Inc.; Pepsi-Cola Bottling Co. of St. Mary's Inc.; Pepsi-Cola Bottling Co. of Tampa; Pepsi-Cola Bottling Co. of Valdosta; Pepsi-Cola Bottling Co. of Waterloo, Iowa; Pepsi-Cola Bottling Co. of Wichita, Inc.; Pepsi-Cola Bottling Co. of Wilmington; Pepsi-Cola Canada, Ltd.; Pepsi-Cola Canada (NRO), Ltd.; Pepsi-Cola Canada (NRO-Second), Ltd.; Pepsi-Cola Canada

(NRO-Third), Ltd.; Pepsi-Cola Canada (NRO-Fourth), Ltd.; Pepsi-Cola Chile Consultores Ltda; Pepsi-Cola de Espana, S.A.; Pepsi-Cola GmbH; Pepsi-Cola Manufacturing (Ireland); Pepsi-Cola Manufacturing Company, Inc.; Pepsi-Cola Mediterranean, Ltd.; Pepsi-Cola Mexicana S.A. de C.V.; Pepsi-Cola Personnel Inc.; Pepsi-Cola San Joaquin Bottling Company; Pepsi-Cola (Overseas) Ltd.; Pepsi-Cola Distributing Co. of Delaware Valley; Pepsi-Cola Holding Co. of Wilmington and South Jersey, Inc.; Pizza Hut, Inc.; Pizza Hut of America, Inc.; Pizza Hut of Ocmulgee, Inc.; Pizza Hut of Okemah, Inc.; Pizza Hut Properties Pty, Limited; Pizza Huts of the Northwest, Inc; Pizza Hut of Titusville, Inc.; Pizza Hut (UK) Ltd.; Productos PepsiCo, S.A.; QSR, Inc.; Quick Service Restaurants, Inc., Pecot, Inc.; Pedux Realty, Inc.; Rice Bottling Enterprises, Inc.; Rogers Beverages, Inc.; Sabritas S.A. de C.V., Saxton Bottling Co., Inc.; Seven-Up International, Inc. Seven-Up Ireland Limited; Seven-Up Netherlands, B.V.; Seven-Up Southern Hempisphere, Inc.; Smartfoods, Inc.; Smiths' Crisps Limited; Southwest Beverage Corporation; Taco Bell Corp.; Taco Bell Royalty Company; The Concentrate Manufacturing Company of Ireland; The Concentration Manufacturing Company of Puerto Rico; TLF, Inc.; UniBev, Inc.;

UniBev Packaging, Inc.; Walkers Crisps Limited; Walkers Potatoes Limited Waycross Pepsi-Cola Bottling Co. Omitted from the list supplied by counsel for Respondent are said to be approximately 185 insignificant or inactive subsidiaries which, if considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary, and approximately 130 subsidiaries of Pizza Hut, Inc., and 30 subsidiaries of Kentucky Fried Chicken Corporation and Kentucky Fried Chicken Corporate Holdings Ltd., most of which operate restaurants in the U.S., and in foreign countries.

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No. 92-_____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1991

JOHNNIE K. WALKER,

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v.

FRITO-LAY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Petitioner, Johnnie K. Walker, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on January 9, 1992.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is unpublished, and is set out in the Appendix to this petition at pages 1a-2a. The order of the court of appeals denying rehearing, which is not reported, is set out at 34a. The judgment of the district court appears at 3a-4a. The findings of fact and conclusions of law on which the judgment is based is presented at 5a through 28a including footnotes. An unpublished summary denial is set out on page 30a as it appeared on the face of Plaintiff's Motion for Disqualification of Federal Judges Resident in Orlando. So is a similar denial set forth on page 33a as it appeared on the Plaintiff's Motion for Reconsideration of Recusal. A bench ruling is set forth at pp. 35a-37a; the judge sustained an objection by Defendant based on its pre-trial motion in limine to exclude from the trial a decision of a state unemployment compensation appeals board and transcripts on which that ruling was based.

RELATED RULINGS

Also contained in the Appendix are the decision of the aforementioned Florida unemployment compensation appeals board at pp. 38a-44a and an order of recusal by the trial judge in another case in which the application for her disqualification was made below. The latter appears at pp. 45a-47a.

JURISDICTION

The judge of the court of appeals affirming the district court's dismissal of the case was entered on January 9, 1992. A timely petition for rehearing was denied on February 28, 1988. On May 19, 1992, Justice Anthony M. Kennedy entered an order extending the time for filing a petition for writ of certiorari to and including June 27, 1992. The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).

STATUTES, CONSTITUTIONAL PROVISION AND RULES INVOLVED

PL 102-166 (S1745), CIVIL RIGHTS ACT of 1991, 105 Stat. 1071, provides in pertinent part:

> An Act to amend the Civil Rights Act of 1964 to strengthen and improve federal Civil Rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.
>
> Section 1. Short Title. This Act may be cited as the "Civil Rights Act of 1991."
>
> Section 2. Findings: The Congress finds that--(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace...(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.
>
> Section 3. Purposes: The purposes of this act are--(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;...(2) to respond to recent decisions of the Supreme Court by expanding the scope of relevant Civil Rights statutes in order to provide adequate protection to victims of discrimination.

TITLE I--

FEDERAL CIVIL RIGHTS REMEDIES

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS. Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended--(1) by inserting "(a)" before "All persons within;" and (2) by adding at the end the following new subsections: (b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship; "(c) The rights protected by this section are protected against impaiment by nongovernmental discrimination and impairment under color of State law.

SEC. 102. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION. The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section: SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN

EMPLOYMENT. "(a) RIGHT OF RECOVERY.-(1) CIVIL RIGHTS. In an action brought by a complaining party under section 706 or 717 of the CIVIL RIGHTS ACT of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 from the respondent....(b) COMPENSATORY AND PUNITIVE DAMAGES.--(1) DETERMINATION OF PUNITIVE DAMAGES.--A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual. (2) EXCLUSIONS FROM COMPENSATORY DAMAGES

--Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964. (3) LIMITATIONS.--The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--"(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000. (4) CONSTRUCTION.--Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981). (c) JURY TRIAL.--If a complaining party seeks compensatory or punitive damages under this section--(1) any party may demand a trial by jury; and (2) the court shall not inform the jury of the limitations described in subsection (b)(3). (d) DEFINITIONS.--As used in this section: (1) COMPLAINING PARTY.--The term "complaining party" means--(A) in the case of a person seeking to bring an action under subsection (a)(1)... a person who may bring an

action or proceeding under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.);....(2) DISCRIMINATORY PRACTICE-- The term 'discriminatory practice' means the discrimination described in paragraph (1)....

SEC. 103. ATTORNEY'S FEES. The last sentence of section 722 of the Revised Statutes (42 U.S.C. § 1988) is amended by inserting ", 1977A" after "1977".

SEC. 104. DEFINITIONS. Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end of the following new subsections: (l) The term 'complaining party' means...a person who may bring an action or proceeding under this title. (m) The term 'demonstrates' means meets the burdens of production and persuasion. (n) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program or Federal entity subject to section 717.".

SEC. 107. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATIONS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.(a) IN GENERAL.--Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended

by sections 105 and 106) is further amended by adding at the end the following new subsection: "(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." (b) ENFORCEMENT PROVISIONS:--Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended--(1) by designating the first through third sentences as paragraph (1); (2) by designating the fourth sentence as paragraph (2)(A) and indenting accordingly; and (3) by adding at the end the following new subparagraph; "(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court --(i) may grant declaratory relief; injunctive relief (except as provided in clause [ii]), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Before passage of the Civil Rights Act of 1991, Section 1981 of 42 U.S. provided:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-(2)(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his privileges of employment because of such individual's race, color, religion, sex, or national origin...

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 38 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Right Preserved. The right of trial jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate. (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at the any time after the comencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

Rule 39 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

28 U.S.C. § 144, Judiciary and Judicial Procedure, provides:

> Bias or prejudice of a judge: Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed

> no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 455(a), Judiciary and Judicial Procedure provides:

> Disqualification of justice, judge, or magistrate: Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Rule 60(b), Federal Rules of Civil Procedure, provides in pertinent part:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion an upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect...or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time....A motion uner this subdivision (b) does not affect the finality of a jugment or suspend its operation.

Rule 59, Federal Rules of Civil Procedure, provides in pertinent part:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues...(2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity of the United States....(b) Time for Motion. A motion for a new trial shall be serve not later than 10 days after the entry of the judgment.

STATEMENT OF THE CASE

Petitioner filed this action on June 19, 1989. He alleged that the Respondent employer treated him differently from whites in 1988 after he became involved in a dispute with a white female supervisor, and made allegations about racial discrimination at its Orlando plant. The company discharged him in September 3,1988, two days before Petitioner's 10th anniversary as a production worker at the plant.

From the outset of this civil rights action, Petitioner sought full relief pursuant to Title VII of the 1964 Civil Rights Act and 42 U.S.C. § 1981, after the U.S. Equal Employment Opportunity Commission ("EEOC") sent his attorney below a right-to-sue letter dated April 28, 1989. On the face of the complaint was a request for a jury trial.

In the complaint was an allegation that both resident federal district judges in Orlando had

stepped aside less than a year earlier for the third time on motion of Petitioner's attorney. The relief statement prayed the matter would be heard by a judge other than the two in residence in Orlando.

When the Hon. Patricia Fawsett, who was assigned to the case, did not step aside, a motion was filed for her to do so, pursuant to 28 U.S.C. § 144. Petitioner provided a requisite affidavit.

Judge Fawsett was asked to step aside, on the same grounds which caused her to recuse herself less than a year earlier in COG v. City of Orlando, #88-962-Civ-Orl-19 (M.D. FL 1988), and have the case reassigned by the chief judge (App. 44a-46a). In this instance, Judge Fawsett refused to do so, without any stated reason other than that "(t)his motion (sic) is legally insufficient as a matter of law and is denied." (App. 29a).

In 1988-89, Petitioner was a member of a COG. COG sought to protect African-Americans like him from discrimination in the Orlando, FL area.

He participated in group discussions about the federal court proceedings initiated by COG in October, 1988. In the fall of 1988, Petitioner retained the COG attorney to represent him in all matters related to his discharge by Respondent.

In September/October, 1990, immediately before, during and after the trial in this case, the trial judge's antipathy to blacks, especially civil rights complainants, was made known to Petitioner's attorney below: (1) by a former law clerk of the trial judge with whom counsel was associated on a case; (2) by the local bar association president who was a former partner of the judge, at a meeting of the local black bar association to which Petitioner's counsel belonged; and (3) by a veteran local labor lawyer at a meeting of a state commission investigating racial and gender bias in the judicial system in Florida

On the basis of those extra-judicial statements, Petitioner's counsel again asked the

trial judge to step aside, pursuant to 28 U.S.C. § 455a. Timely motions were made for a new trial, and for reconsideration of recusal, pursuant to Rules 60(b) and 59 of the Federal Rules of Civil Procedure. Again Judge Fawsett refused without explanation to step aside (App. 31a).

After trial here, Judge Fawsett in her Findings of Fact and Conclusions of Law acknowledged that her factual determination on the merits was based on her assessment of the credibility of Petitioner (see, e.g., App. 13a) and of Respondent supervisors, especially the white manager, who was the only alleged eyewitness to the events which gave rise to the termination of Plaintiff.

Respondent alleged that the white supervisor had observed from an upstairs office window Petitioner leaving the plant without clocking out and returning to do so. Petitioner claimed he clocked out before he left, to run an errand, and he returned to pick up his tool box and add up his

hours to determine his pay.

All parties agreed the events occurred between 10:30 p.m. and 11 p.m, Saturday, Sept. 3, 1988, after the particular shift had been concluded early by 10:30 p.m. (App. 6a-17a). Petitioner was not notified until he returned, Tuesday, Sept. 6th, after the Labor Day weekend, that his actions on Saturday had been called into question.

Petitioner was terminated on Sept. 8th; his termination first was affirmed by the plant manager on Sept. 13th, and again later after Petitioner appealed. The final internal appeal was concluded at the end of November after Petitioner exhausted all of the requisite steps. That process is described by the judge below in her findings.

However, omitted by her is a determination favorable to Petitioner made for the Florida unemployment compensation appeals board (App. 38a-44a). The decision was made and sent to the company before the final internal appeal (App. 45a).

In the state proceeding, Respondent relied on sworn testimony from that same white supervisor and a Frito-Lay personnel representative. When the company lost, Respondent did not contest the finding by the state agency that any company allegations of misconduct were deficient.

By motion in limine, Respondent did succeed at trial in having the administrative decision (38a -44a) and the hearing transcript kept out of this case for any and all purposes by Judge Fawsett. Not only was that administrative decision kept away from an advisory jury but it also was excluded from the judge's own deliberations.

An all-white advisory jury was convened after Respondent argued against a constitutional one, in its last pre-trial opportunity, more than a year after this action was begun, and more than a year after the decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

Despite the use of an advisory jury, which was relied upon primarily to exclude testimony and documents, such as the administrative decision, the trial court (App. 3a) relied on its own findings of fact and conclusions of law. The judge continued to do so in post-trial determinations. She awarded full costs to Respondent, even though the jury found Petitioner had prevailed on the employer's counterclaim for vacation pay given to the discharged worker after he was terminated.

The costs were appealed separately and the appeals consolidated in the court of appeals (#90-9360/#91-3287). No separate mention was made by the appeals court about the costs issue.

On Jan. 9, 1992, weeks after the passage of the Civil Rights Act of 1991, the court of appeals affirmed without opinion the judgment below of Sept. 21, 1990, and the Findings of Fact and Conclusions of Law by Judge Fawsett on the previous day. In pertinent part, Judge Fawsett ruled:

"On the basis of the Supreme Court's recent decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), the Court finds that (Petitioner) is unable to state a claim under § 1981." (App. 17a-18a). "Furthermore, while there is a right to a jury trial on the legal issues in a § 1981 claim, the Court finds, as discussed below, that Plaintiff's § 1981 claim fails as a matter of law in the wake of Patterson v. McLean Credit Union, 109 S.Ct. 1363 (1989). For these reasons, the Court GRANTS Defendant's Motion to Strike Plaintiff's Demand for Jury Trial. The verdict by the jury is treated as advisory." (App. 17a-18a).

On the Title VII claim the judge reserved to herself, she found Petitioner met his initial burden of establishing a prima facie case by a preponderance of the evidence (App. 22a). But she found against Petitioner, because he failed to demonstrate that his dismissal for leaving the premises without permission before clocking out

was a pretext by Respondent for its racially discriminatory purposes, or that Petitioner was victimized by racially disparate disciplinary treatment favorable to whites in Respondent's handling of the same alleged infractions (App. 25a).

In a final footnote, the trial judge noted as a result of a company rule posted in 1985 which established termination as a possible employer action for the infraction, a black female was terminated in 1985 and Petitioner was fired in 1988. Only after a policy was applied exclusively to blacks for four years, "three whites (two males and one female) were terminated for violating this rule in 1989." (App. 29a). The distinction in policy application made here was not in the footnote.

The 1991 Civil Rights Act certainly was not available to the trial judge in 1990, when she made her decision. Neither was it enacted in time for briefing to the court of appeals, although its possible passage was publicly discussed enough to

merit inclusion for Petitioner in the reply brief below, filed on Nov. 5, 1991. Cited and discussed therein was the Civil Rights Act of 1990; it contained provisions similar to those enacted on Nov. 20, 1991.

But the 1991 version had been law for six-seven weeks when the court of appeals without oral argument affirmed the trial court, (App. 1a-2a). See discussion supra. On the basis of the law and possible retroactive application in this case, Petitioner petitioned for rehearing. The petition was denied on Feb. 28, 1992 (App. 34a).

REASONS FOR GRANTING THE WRIT

I. THIS COURT THIS TERM HAS GRANTED PETITIONS FOR CERTIORARI TO THREE OTHER CIRCUITS, TO HAVE THEM CONSIDER § 1981 CLAIMS IN LIGHT OF THE CIVIL RIGHTS ACT OF 1991. THE ELEVENTH ALSO SHOULD DO SO.

As yet, there is no definitive ruling either here or from any federal circuit about the applicability of the Civil Rights Act of 1991 to § 1981 claims pending in the federal court system when the legislation became law in November, 1991.

This case was pending on appeal at the time. Weeks later, without reference to the Act, the Eleventh Circuit affirmed the decision of the trial court that the § 1981 claim failed as a matter of law, because that statute, as it existed in effect when this case was initiated, had been judicially decided in this jurisdiction not to apply to racial discrimination in terminations by employers.

That affirmance incorporated the trial court finding that without the § 1981 claim Petitioner had not been entitled to a trial by jury. The trial

judge acknowledged specifically that this Court regarded the issue of the applicability of § 1981 to discharge cases to be an open question, based on her interpretation of Lytle v. Household Manufacturing, Inc., 110 S. Ct. 1331, 1336, n. 3 (1990); Id., at 1339 (O'Connor, J., concurring); Jett v. Dallas Independent School District, 109 S. Ct. 2701, 2710 (1989) (App. 27a).

The trial court did not have the opportunity to consider the applicability of Civil Rights Act changes to judicial interpretation of § 1981. But the changes had been made when the Eleventh Circuit affirmed her decision on Jan. 9, 1992.

Since the court of appeals had not referred to the Act in its ruling, Petitioner sought a re-hearing to have the court rule on the applicability of the Act to his § 1981 claim and demand for a jury. The Eleventh Circuit denied the request.

On February 19, 1992, the U.S. Circuit Court for the District of Columbia agreed to hear an interlocutory appeal in Van Meter v Barr, #92-8003 (D. C. Cir. 1992) (to decide whether the 1991 Act applied to cases pending before the law went into effect the previous November). According to Joseph M. Sellers, of the Washington Lawyers' Committee for Civil Rights Under Law, as of that date, 19 district courts had held that the 1991 Act applied retroactively and 25 judges had rejected its retroactive application.

Courts below still are struggling with the fine points of retroactive applications, e.g. whether the kind of relief at issue is procedural or substantive, Sudtlelgte v Sessions, 90-1016-CV-W-6 (W.D. Mo. April 21, 1992), 60 U.S.L.W. 2690 (May 12, 1992).

This Court has granted certiorari by summary dispositions and remanded to the District of Columbia Circuit, and to the Fourth and

Eighth Circuits for review § 1981 claims in light of the 1991 Civil Act. Like Petitioner's case here, the cases being considered were in the federal court system when the legislation became law. Gersman v. Group Health Association, Inc., 931 F. 2d 1565 (D. C. Cir. 1565), cert. granted, S. Ct. #91-724, 60 U.S.L.W. 3519 (Jan. 28, 1992); Holland v. Virginia Banks, Inc., (Fourth Circuit, unpublished), cert. granted, S. Ct. #91-974, 60 U.S.L.W. 3577 (Feb. 25, 1992); Hicks v. Brown Group, Inc., 946 F.2d 1344 (8th Cir. 1991), and, separately 57 FEP Cases 835, cert. granted, #91-1116, 60 U.S.L.W. 3598 (March 3, 1992). Each of those cases is summarized in U.S. Law Week: Gersman v. Group Health, supra, 60 U.S.L.W. 3422 (Dec. 10, 1991); Holland v First Virginia Banks supra, 60 U.S.L.W. 3527 (Jan. 28, 1992); and Hicks v. Brown, supra, 60 U.S.L.W. 3586 (Feb. 25, 1992).

The first two questions presented to this Court are similar substantively to those in Holland v. Virginia, supra, 60 U.S.L.W. 3527 (Jan. 28, 1992). For their determination, this Court should grant the writ of certiorari in this case and remand this matter to the Eleventh Circuit for determination in light of the 1991 Civil Rights Act.

II. THE ELEVENTH CIRCUIT CONTINUES TO RELY ERRONEOUSLY ON ITS INTERPRETATION OF PATTERSON V. MCLEAN CREDIT UNION IN § 1981 EMPLOYMENT DISCRIMINATION DISCHARGE CASES IN ITS JURISDICTION WITHOUT REGARD TO POSSIBLE APPLICABILITY OF 1991 CIVIL RIGHTS ACT CHANGES IN LAW.

On Feb. 3, 1992, the Eleventh Circuit determined that a §1981 racial employment discrimination discharge claim failed under this Court's intervening ruling in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), Pearson v. Macon-Bibb County Hospital Authority, 952 F.2 1274 (11th Cir. 1992). In Pearson, the Eleventh Circuit identified a clear mandate in Patterson

for retroactive application of the decision to dismiss all § 1981 discharge claims, id., 1276-77.

So in Pearson, the Eleventh Circuit affirmed summary judgment. Concluding that Patterson language limiting § 1981 only to conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process, the Eleventh Circuit Pearson ruling relied on its own precedent by other panels, which also interpreted Patterson to deny § 1981 claims in employment discharge cases. Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1520 (11th Cir. 1991) and Thompkins v. Dekalb County Hosp. Auth., 916 F.2d 600, 601 (11th Cir.1990 (per curiam), cited in Pearson at 1276-77.

No mention whatsoever is made in Pearson about the possible application of the 1991 Civil Rights Act, passed more than two months., earlier to § 1981 claims in employment discharge cases pending in the federal courts when it became law.

The Eleventh Circuit applied a similar analysis on Nov. 5, 1991, when passage of the Act appeared to be imminent. The court of appeals denied a demand for a jury in a § 1981 employment race discrimination discharge case, Wall v. Trust Co. of Georgia, 946 F.2d 805 (11th Cir. 1991). "Since the trial court properly dismissed Wall's section 1981 claim, her equitable claim under Title VII was not entitled to a trial by jury, Harrison (v. Associates Corp. of North America, 917 F.2d 195,) 198 (5th Cir. 1990). Wilson v. City of Aliceville, 779 F.2d 631 (11th Cir. 1986)," id. at 809.

On Jan. 9, 1992, when the Eleventh Circuit affirmed the trial court decision here, that court of appeals updated the applicable law as it was known within the jurisdiction. The trial judge had acknowledged there was a split in the federal circuits and in district courts about the applicability of Patterson to discharge cases.

This Court has never ruled on the issue. At the time the trial judge made her ruling, she observed that the Eleventh Circuit had not decided the issue either. However, she determined on the basis of Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir. 1990) that the Eleventh Circuit would join those applying Patterson to deny § 1981 claims in discharge cases (App. 20a-21a). By hindsight, she obviously was correct.

Such denial of a § 1981 claim automatically resulted in the 11th Circuit in denial of a jury if the only other federal claim arose under Title VII. Neither the trial court nor the Eleventh Circuit has applied this Court's holding on that issue in Lytle v. Household Manufacturing, Inc., 108 L.Ed. 504, (1990). Justice O'Connor's concurrence was cited supra in the discussion here regarding the absence of decision by this Court about the applicability of Patterson to racially discriminatory discharges.

In Lytle, this Court relied on the Seventh Amendment preservation of the right to trial by jury to justify one for that petitioner, when his § 1981 claim was dismissed on the eve of trial, and the trial court itself resolved the remaining Title VII equitable issue.

In Lytle, the court refused to consider the applicability of Patterson since that decision had not been available to the courts below. The trial court was found to have erroneously ruled on the Lytle § 1981 claim on other grounds. The case was returned for jury trial below.

Both Patterson and Lytle and their applications in the Eleventh Circuit should have come under scrutiny in this case in light of the 1991 Civil Rights Act, after the law was timely called to the attention of the appeals court. No other circuit in published decisions appears to have ignored the Act as clearly as the Eleventh Circuit.

While other courts are weighing the applicability of the Act to cases pending in the federal system when it became law, in light of decisions by this Court on retroactivity aspects of such laws, in Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969) and Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974) on the one hand, and Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) on the other, the Eleventh Circuit has shown no signs of entering the debate.

While Justice Scalia, in concurrence, in Kaiser Aluminum and Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990) has observed that Bradley and Bowen are "in irreconcilable contradiction on the issue," the Eleventh Circuit appears to avoid the matter entirely by ruling, not only without regard to the applicability of the 1991 Act, but with persistence in its own interpretation of Patterson. The Eleventh Circuit has done so without further guidance from this Court, to deny the benefits of

either the old or new versions of § 1981 to individuals like Petitioner, who claim to have been victims of racially discriminatory discharges.

This Court should grant certiorari in this case so that Petitioner and innumerable others in the Eleventh Circuit do not lose constitutional rights including a trial by jury, before the applicability of the Act to their cases is resolved.

III. THE APPEARANCE OF JUSTICE IN THIS CASE REQUIRES RECONSIDERATION OF THE MERITS OF PETITIONER'S CLAIMS IN ACCORDANCE WITH DUE PROCESS.

From the outset, Petitioner sought recusal of the judge below, because she, along with the other federal judge resident in Orlando, FL, had recused themselves less than a year earlier in a race discrimination case brought by a black civil rights organization and others, COG v. City, supra.

Petitioner was a COG member who participated in the group's successful decision to have the judges recuse themselves, primarily because they were perceived as being biased against

the only attorney who made himself available to the group and its membership in Orlando. Petitioner also had retained that attorney below.

When Petitioner sought by affidavit to have the judge below recused pursuant to 28 U.S.C. § 144, she denied his application, because, she wrote, "(t)his motion is insufficient as a matter of law" (App. 29a). No explanation was given.

The statutory provision requires that whenever a party to any proceeding in a district court makes and files an affidavit that the judge before whom the matter is pending has a personal bias or prejudice against him, such judge shall proceed no further, id. Another judge is assigned to the case. Conceivably a succeeding jurist can determine that no bias existed at all and the matter should be returned to the judge originally assigned to hear the case.

By finding the motion insufficient, as matter of law, the judge apparently intended to

reject the work of the attorney without finding fault with the affidavit of Petitioner. But she stated no reason for having done so.

Prejudice against a party's attorney usually is insufficient to justify recusal, unless, as here, in light of COG v. City, supra, a party can show that such a controversy could demonstrate a bias against him, Diversified Numismatics v. City of Orlando, 949 F.2d 382 (11th Cir. 1991). Without such opportunity, Petitioner was required to face a trial before the judge whose neutrality he questioned.

The issue is not appealable immediately except in the most extraordinary circumstances, In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980). All Fifth Circuit decisions before Oct. 1, 1981, are binding in the Eleventh, Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

Petitioner still expected to have the benefit of an impartial factfinder on the merits, since he had no reason to doubt until the eve of trial that the matter would be heard by the requisite constitutional jury he had demanded. Then more than a year after Patterson, Respondent objected to Petitioner's demand for a constitutional jury.

After the judge first suggested that objection might have been waive d by the delay, she decided to convene a jury. If, as she stated in advance she believed, Patterson precluded both th § 1981 claim and consequently the jury, she would declare the panel to be advisory, as she later did.

While the jury sat Respondent was able to use it for good purpose, e.g. to have evidence excluded as prejuicial, even if relevant. The crucial items were a decision of a state unemployment compensation appeals board (App. 37a-43a) and the tapes and transcripts of the sworn testimony underlying that ruling.

Petitioner offered that evidence to show that the Respondent's justification for the termination had been pretextual. Such evidence certainly would not have been excluded properly by a judge hearing the case without jury. The Eleventh Circuit subsequently determined that such evidence is not excludable with a jury, Barfield v. Orange County, 911 F.2d 644 (11th Cir. 1990). But it was too late for the evidence here.

Petitioner had gotten the worst of all worlds from a judge whose impartiality he questioned. He could not rely on any findings of fact by the state administrative agency, or even the jury's verdict rendered without knowledge of that decision. The judge was to render her own uncontradicted findings of fact.

"An advisory jury merely advises. Its findings of fact are not binding on the trial court. Indeed the court is free to adopt its findings in whole or in part to disregard them altogether (cite

omitted). The ultimate responsibility for finding the facts remains with the court," Wilson v. City of Aliceville, 779 F.2 631, 635-636 (11th Cir. 1986).

By using the jury as she had done, the judge also avoided contradiction by the unemployment compensation appeals board decision. Now she was free to fashion her own findings of fact from evidence and assess credibility without encumbrance. She did so--against Petitioner.

One finding, however, was less subjective. The company had terminated only one person, a black female, before it discharged Petitioner for his alleged infraction. That fact is artfully disguised in a final footnote to the trial judge's findings of fact an conclusions of law.

Without explanatioo, the judge somehow found relevance in the fact that three whites had been terminated for the infraction in 1989--after Petitioner was terminated, after he brought his

claim of discrimination to the EEOC.

After trial, when Petitioner's attorney learned from extra-judicial statements discussed supra that the judge historically had been known for antipathy toward black civil rights petitioners and advocates for them, he moved for a new trial, and asked her to reconsider recusal, pursuant to 28 U.S.C. §455a. See also Rules 59 and 60(b), F.R.Civ.P. She denied both motions without comment.

On appeal, the Eleventh Circuit ignored entirely the issue of bias and the handling when it was raised below, first in the complaint, then by motion and affiavit pursuant to 28 U.S.C. § 144, and, finally, by a 60(b) motion for reconsideration of recusal, pursuant to 28 U.S.C. § 455a. This Court has approved such use of the rules to preserve the appearance of justice, Liljeberg v. Health Services Acquisitions Corp., 486 U.S. 847 (1988).

The Eleventh Circuit has been criticized for reducing Liljeberg to a matter in which a party

alleging bias has to show not only prejudice but that the refusal of judicial disqualification proved to be something more than harmless error, K. Fall, "Liljeberg v. Health Services Acquisition Corp.: The Supreme Court Encourages Disqualification of Federal Judges Under Section 455(a)," 1989 Wisc. L. Rev. 1033, 1058-59.

By affirming the judge, without comment on the attack on her partiality, the Eleventh Circuit dispensed with this § 1981 claim and a right to a jury trial, with litle expenditure of judicial resources. The Lytle majority cautioned against such erosion of constitutional an civil rights in these cases for the sake of economy, and stressed the need for assurance, usually through the jury system, that civil rights litigants will get justice in the courts, id., 108 L.E.2d, supra, at 516-517.

The possibility of reversing the taint of bias below should provide further incentive to have this case sent back to the Eleventh Circuit.

CONCLUSION

For the above reasons, certiorari should be granted and the case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of the Civil Rights Act of 1991, just as this Court has ordered it to be done in similar cases arising from the District of Columbia, Fourth, and Eighth Circuits. This case is suitable for such an assessment.

Respectfully submitted,

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